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No. 93-1537

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

ROBERT D. KEHS, KENNETH LEBON,
and STEVEN C. BILLINGS,
Petitioners,

v.

LARRY EUGENE FOSTER, ROBERT STEWART BLOEMER,
JAMES CAMPBELL, NORTHWEST AIRLINES, INC., and
AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF IN OPPOSITION OF RESPONDENT AIR LINE PILOTS ASSOCIATION

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TABLE OF CONTENTS

	Page
COUNTERSTATEMENT OF THE CASE	1
STATEMENT OF FACTS	2
1. The Roberts Award And The Dispute Resolution Agreement	2
2. The Proceedings Below	4
REASONS WHY THE PETITION SHOULD BE DENIED	6
I. THE EIGHTH CIRCUIT'S FINDING THAT THE DISTRICT COURT'S PROCEDURAL RULINGS WERE NOT ABUSES OF DISCRETION IS CONSISTENT WITH THE LAW OF THIS COURT AND OTHER CIRCUITS	6
A. Denial Of The Rule 56(f) Continuance Was Proper And Consistent With Established Law	7
B. The District Court's Treatment Of The Alternative Motion To Dismiss Or For Summary Judgment Did Not Deprive Petitioners Of An Opportunity To Respond	10
II. THE EIGHTH CIRCUIT'S HOLDING THAT ISSUES OF TIMELINESS ARE PROCEDURAL MATTERS WHICH SHOULD BE LEFT TO ARBITRATORS IS CONSISTENT WITH ESTABLISHED LAW	11
CONCLUSION	14

TABLE OF AUTHORITIES

CASES: Page

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 7, 8
Automotive, Petroleum and Allied Industries Employees Union, Local No. 618 v. Town and Country Ford, Inc., 709 F.2d 509 (8th Cir. 1983) 11
Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 8, 9
John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543 (1964) 5, 11, 13
Jones v. St. Louis-San Francisco Ry. Co., 728 F.2d 257 (6th Cir. 1984) 12
Local 560, IBT v. Anchor Motor Freight, Inc., 415 F.2d 220 (3d Cir. 1969) 12
Lodge No. 725, IAM v. Mooney Aircraft, Inc., 410 F.2d 681 (5th Cir. 1969) 12
McKesson Corp. v. Local 150 IBT, 969 F.2d 831 (9th Cir. 1992) 12
Stroh Container Co. v. Delphi Industries, Inc., 783 F.2d 743 (8th Cir.), *cert. denied*, 476 U.S. 1141 (1986) 12, 14
United Paperworkers, Int'l Union v. Misco, Inc., 484 U.S. 29 (1987) 12
United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960) 12
Washington v. Allstate Ins. Co., 901 F.2d 1281 (5th Cir. 1990) 10
Willmar Poultry Co. v. Morton-Norwich Products, Inc., 520 F.2d 289 (8th Cir. 1975) (*en banc*), *cert. denied*, 424 U.S. 915 (1976) 7
Yashon v. Gregory, 737 F.2d 547 (6th Cir. 1984) .. 9, 10

RULES:

Fed. R. Civ. P. 12(b) 10
Fed. R. Civ. P. 56 ..... 8, 10
Fed. R. Civ. P. 56(f) ..... *passim*
Fed. R. Civ. P. 59(e) 5, 9, 10

MISCELLANEOUS:

8 C. Wright & A. Miller, Federal Practice and Procedure § 2740 (1982) 7

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BRIEF IN OPPOSITION OF RESPONDENT AIR LINE PILOTS ASSOCIATION

Respondent Air Line Pilots Association, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Eighth Circuit's decision in this case.

COUNTERSTATEMENT OF THE CASE

The petition contains misstatements regarding the factual background and the lower court proceedings in this case. Therefore, a statement of the facts is set forth below.

STATEMENT OF FACTS

1. *The Roberts Award And The Dispute Resolution Agreement*

This case arises out of the merger of Northwest Airlines ("Northwest") and Republic Airlines in 1986 and efforts to integrate the pilot seniority lists. Petitioners are the Merger Representatives of the pre-merger Northwest pilots ("Northwest Representatives"). Respondents include: the Merger Representatives of the former Republic pilots ("Republic Representatives"); the Air Line Pilots Association ("ALPA"), which was the collective bargaining representative of the two pre-merger pilot groups and continues to be the collective bargaining representative for the merged pilot group at Northwest; and Northwest, the current employer of both pilot groups.

The pilot seniority lists were merged pursuant to ALPA's merger policy (JA 7 at 251),[1] which requires representatives of merging pilot groups to engage in negotiations and, if necessary, arbitration to arrive at an integrated seniority list. On November 6, 1989, Arbitrator Thomas T. Roberts, as Chairman of a three-member Arbitration Board, issued the award combining the two separate pre-merger seniority lists. (JA 7 at 262). In addition to the combined seniority list, the Roberts Award contained conditions and restrictions which govern the manner in which pilot positions are to be awarded at the merged airline. (JA 7 at 275).

On April 26, 1990, the parties entered into a Dispute Resolution Agreement (JA 7 at 356, 593) which set forth the procedures for resolving disputes relating to the interpretation and application of the November 6 Award.

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[1] References to the Joint Appendix of the parties in the Court of Appeals are cited as "JA [tab number] at [page number of the Appendix]." References to the Petitioner's Appendix are cited as "A- [page number]." References to the Petition for Certiorari are cited as "Pet. at [page number]."

ALPA and Northwest, as well as the Merger Representatives of the two pre-merger pilot groups, are all parties to the Dispute Resolution Agreement. Under the Agreement, a Dispute Resolution Committee ("DRC") comprised of representatives of the two pilot groups would attempt to resolve disputes; claims not resolved by the DRC are to be submitted to binding arbitration as the exclusive and final forum for resolution. (JA 7 at 356-367). The Dispute Resolution Agreement provided that Mr. Roberts would serve as Chairman of the Dispute Resolution Arbitration Board until March 31, 1992. (JA 7 at 365). It also provided that the arbitration board would resolve disputes over the interpretation or application of the Dispute Resolution Agreement itself. (JA 7 at 542; JA 16 at 751).

The Dispute Resolution Arbitration Board, under the chairmanship of Mr. Roberts, has conducted a series of arbitral proceedings under the Agreement, resulting in a number of Supplemental Awards, several of which the Petitioners, the Northwest Representatives, contend are invalid. The Northwest Representatives sued to overturn two of the Supplemental Awards, contending that they were issued late under the terms of the Dispute Resolution Agreement. ALPA, Northwest and the Republic Representatives were named as defendants in the lawsuit.

After the Northwest Representatives filed the lawsuit, Mr. Roberts issued an additional Supplemental Award in which he ruled that the contested awards were timely under the terms of the Dispute Resolution Agreement. (JA 7 at 582). In reaching this conclusion, Mr. Roberts relied on his power to interpret the Dispute Resolution Agreement, which the parties expressly granted him in Section X of the Agreement. (JA 7 at 593). Section X provides that disputes over the interpretation of the Dispute Resolution Agreement itself would be processed in the same manner as disputes about the interpretation of the Roberts Award; that is, they would be subject to binding arbitration before the Arbitration Board. (*Id.*).

2. *The Proceedings Below*

The Northwest Representatives originally filed suit on December 27, 1991, under the Railway Labor Act and the Minnesota Arbitration Act, requesting that the District Court vacate the two allegedly untimely Supplemental Awards. The Northwest Representatives served extensive interrogatories and document requests on all of the defendants on June 8, 1992, to which they received responses and responsive documents in August and September, 1992. In July, 1992, the attorneys for both premerger pilot groups deposed two ALPA attorneys who had negotiated the Dispute Resolution Agreement. (JA 17 at 763, *et seq.*).

On August 25, 1992, the Republic Representatives filed their Motion to Dismiss the Second Amended Complaint, or, in the Alternative, for Summary Judgment in Their Favor. (JA 15-17). On September 17, 1992, ALPA filed its Joinder in Motion of Individual Defendants and on October 6, 1992, Northwest filed its Memorandum in Support of Individual Defendants' Motion to Dismiss the Second Amended Complaint. (JA 22). By letter dated September 23, 1992, Richard F. Watt, attorney for the Petitioners, advised the District Court that: the Northwest Representatives assumed that the motion of the Republic Representatives would be treated as one for summary judgment; and that the Northwest Representatives intended to file a motion for a continuance under Rule 56(f). (JA 20 at 880). On October 1, 1992, the Northwest Representatives filed their Request for Continuance Pursuant to Federal Rule 56(f) accompanied by the affidavit of Mr. Watt. (JA 20-21).

On October 15, 1992, a hearing was held before the District Court on the Republic Representatives' motion to dismiss or for summary judgment, and on the Northwest Representatives' request for a continuance under Rule 56(f). The court dismissed the claims that the Supplemental Awards were untimely on the grounds that

these claims raised issues of procedural arbitrability over which the court had no jurisdiction. Alternatively, the court granted summary judgment on the untimeliness claims on the grounds that plaintiffs had not advanced any material issue of fact with respect to the reasonableness of the arbitrator's delay or any alleged prejudice resulting from such delay. The court rejected claims that the arbitrator lacked jurisdiction to interpret the procedural provisions of the Dispute Resolution Agreement. Finally, the court denied the Northwest Representatives' Rule 56(f) motion because they had failed to meet the burden of demonstrating that such a continuance was justified. (A transcript of the hearing before the District Court, including the court's opinion, is set forth at JA 26). A Judgment Order was issued on October 19, 1992. (A-4).

On October 29, 1992, the Northwest Representatives filed a Motion to Alter or Amend Judgment Pursuant to Federal Rule 59(e). On December 3, 1992, the District Court denied the motion and issued a Memorandum and Order rejecting the Northwest Representatives contentions that the court abused its discretion in simultaneously denying the Rule 56(f) motion and ruling on the motion for summary judgment. (A-7).

On January 28, 1994, in an unpublished *per curiam* opinion, the Eighth Circuit affirmed the District Court's decision, holding that (1) under *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 557 (1964), procedural questions arising out of arbitrable disputes, such as issues of timeliness "should be left to the arbitrator"; and (2) the District Court did not abuse its discretion in denying Petitioners' Rule 56(f) motion and granting summary judgment. The Court of Appeals "agree[d] with the well-reasoned and thorough opinion of the district court." (A-1).

REASONS WHY THE PETITION SHOULD BE DENIED

The Petitioners offer two principal reasons for granting review of the Eighth Circuit's decision. Petitioners argue first that the court erred in finding no abuse of discretion by the District Court in its procedural rulings which resulted in the simultaneous denial of Petitioners' Rule 56(f) motion and granting of their opponents' alternative motion to dismiss or for summary judgment. They contend that this holding conflicts with decisions of this Court and of the Sixth Circuit. Secondly, Petitioners contend, the Eighth Circuit's ruling that the timeliness issue is a procedural one which should be decided by the arbitrator, raises an issue of major importance and conflicts with decisions of other Circuits. Petitioners are plainly wrong. As we show below, the Eighth Circuit's decision is consistent with the established law of this Court and of other Circuits. Moreover, the petition does not raise significant issues either with respect to federal procedure or labor law.

I. THE EIGHTH CIRCUIT'S FINDING THAT THE DISTRICT COURT'S PROCEDURAL RULINGS WERE NOT ABUSES OF DISCRETION IS CONSISTENT WITH THE LAW OF THIS COURT AND OTHER CIRCUITS.

In response to the motion to dismiss or in the alternative for summary judgment filed by the Republic Representatives (and supported by ALPA and Northwest), the Northwest Representatives filed a Rule 56(f) request for a continuance. They did not file any opposition to the motion to dismiss or to the alternative motion for summary judgment. As the courts below found, the Rule 56(f) request was properly denied because the Northwest Representatives did not show why more discovery was needed. Moreover, the Northwest Representatives had adequate notice and reasonable opportunity to respond to the alternative dispositive motion and, thus, the simultaneous denial of the continuance and granting of the

dispositive motion was a proper exercise of the District Court's discretion. Similarly, the District Court acted well within its discretion in treating the alternative motion as a motion for summary judgment to the extent it relied on extraneous material.

A. Denial Of The Rule 56(f) Continuance Was Proper And Consistent With Established Law.

Rule 56(f) permits a party opposing summary judgment to obtain a continuance to conduct specific discovery on facts essential to oppose summary judgment when that party cannot adduce facts justifying its opposition by means of its own affidavits. Rule 56(f) is intended to enable the non-moving party to seek information largely or exclusively under the control of the party moving for summary judgment that would establish the existence of issues of genuinely disputed material fact. 8 C. Wright & A. Miller, Federal Practice And Procedure § 2740 (1982). Rule 56(f) provides the non-moving party with the limited opportunity "to discover information that is *essential* to his opposition." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, n.5 (1986) (emphasis added). *Willmar Poultry Co. v. Morton-Norwich Products, Inc.*, 520 F.2d 289, 294 (8th Cir. 1975) (*en banc*), *cert. denied*, 424 U.S. 915 (1976). It is well established that the party opposing summary judgment must "identify what, if any, facts were within the defendants' *exclusive* control and how, if at all, discovery would assist them in bringing those facts to light." If the request for additional discovery is general and offers no specifics as to what discovery is sought, it should be rejected. *Willmar, supra*, 520 F.2d at 297 (emphasis added).

The Northwest Representatives' request for a continuance and Mr. Watt's affidavit failed to meet Rule 56(f)'s requirements. The courts below found that the Northwest Representatives failed to identify any specific information which was largely or exclusively within the con-

trol of the other parties, and which was essential to their ability to establish the existence of any disputed fact that was material to the legal issues raised in the then-pending motion to dismiss or for summary judgment. The petition also fails to identify any such information.

Moreover, the Northwest Representatives failed below and fail in their petition to show how any of the information they sought would establish a genuine dispute of material fact. They have established no connection between their assertions that "additional discovery" was required and the grounds of the dispositive motion.

Petitioners state that this Court's rulings in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) and *Anderson v. Liberty Lobby, Inc., supra*, with respect to the standards for granting summary judgment under Rule 56, require a "full opportunity for discovery." They contend that they were deprived of this full opportunity and, further, that by upholding the granting of summary judgment in this case, the Eighth Circuit's decision conflicts with the referenced decisions of this Court. This argument is absurd. No decision of this Court purports to relieve a non-moving party of its obligations to meet the standards of Rule 56(f) when seeking a continuance for additional discovery. In *Anderson v. Liberty Lobby*, 477 U.S. at 250 n.5, this Court specifically stated that Rule 56(f) requires a showing that additional discovery "is essential" to oppose a motion for summary judgment. Thus, contrary to Petitioners' contention, the Eighth Circuit's adherence to this principle in affirming the District Court certainly does not create any conflict with this Court's decisions.

Petitioners' contend further that by simultaneously granting summary judgment and denying the Rule 56(f) request, the District Court deprived the Northwest Representatives of an opportunity to respond to the dispositive motions. They argue that the Eighth Circuit affirmance of this decision conflicts with the law of the Sixth

Circuit as expressed in *Yashon v. Gregory*, 737 F.2d 547 (6th Cir. 1984). Petitioners are wrong; clearly, they did in fact have an opportunity to respond and, therefore, there is no conflict between the Circuits on this issue.

As the District Court noted in denying the Rule 59(e) motion, when the Northwest Representatives chose to submit a Rule 56(f) request rather than a substantive response to the Defendants' motions, they were gambling that the District Court would grant them a continuance or at least give them a second chance to submit a substantive response. They took that chance even though they received no positive response from the court to their letter of September 23 indicating their intent to file a Rule 56(f) request. (JA 20 at 880). They refrained from submitting a substantive response even though they had ample time to do so. They did so at their peril. *See Celotex Corp. v. Catrett*, 477 U.S. at 323-325.

In contrast, the Sixth Circuit's decision in *Yashon v. Gregory* involved a factual situation in which the non-moving party plaintiffs were deprived of an opportunity to respond to the motion for summary judgment. In *Yashon*, unlike the instant case, the defendants did not move for summary judgment; summary judgment was ordered *sua sponte* and without notice from the court to plaintiffs that summary judgment was contemplated. There was no evidence in *Yashon* that the non-moving party had in any way waived its opportunity to respond. Under these circumstances, the Sixth Circuit found that the trial court had erred in granting summary judgment *sua sponte* without notice, and criticized the trial court for simultaneously denying the Petitioners' conditional Rule 56(f) request which, the appellate court found, had been filed out of uncertainty and confusion regarding the lower court's intention.

The Northwest Representatives were, in fact, on notice of the possibility of summary judgment and had ample opportunity to present a substantive response to the Re-

public Representatives' motion with a memorandum supported by affidavits and exhibits. Summary judgment in the instant case was not granted *sua sponte* but on motion. Unlike the *Yashon* plaintiffs, the Northwest Representatives were not misled or induced by the court to forego their opportunity to respond. Unlike the *Yashon* plaintiffs, the Northwest Representatives effectively waived their opportunity to respond substantively to the pending motion. Thus, there is no conflict between the *Yashon* case and the Eighth Circuit's decision in this case.

B. The District Court's Treatment Of The Alternative Motion To Dismiss Or For Summary Judgment Did Not Deprive Petitioners Of An Opportunity To Respond.

The Northwest Representatives contend that the District Court failed to afford them a "reasonable opportunity to present all material made pertinent to such a motion by Rule 56" as required by Rule 12(b). (Pet. at 17). They argue that because the District Court's dismissal order failed to explicitly exclude matters outside the pleadings, the court was required to give them advance notice of its intent not to exclude the extraneous materials, so that they could respond to the motion under Rule 56. They assert that affirmance of the District Court's procedural rulings puts the Eighth Circuit in conflict with the law of this Court and other Circuits. (Pet. at 18).

These arguments lack merit. The dispositive motion was for dismissal or alternatively for summary judgment; thus, the Northwest Representatives had notice that the motion might be treated as a motion for summary judgment; they had the opportunity to respond with supporting materials outside the pleadings. *See Washington v. Allstate Ins. Co.*, 901 F.2d 1281, 1284 (5th Cir. 1990). As the District Court found in denying the Northwest Representatives' Rule 59(e) motion, they received adequate notice under the local rules (A-10-11). Moreover,

Petitioners' argument implies that they presumed or were somehow misled into thinking that the court would *not* treat the Defendants' motion as one for summary judgment. However, in their request for a continuance under Rule 56(f) and in their letter to the District Court, the Northwest Representatives indicated clearly and unequivocally that *they* would treat the Defendants' motion as one for summary judgment. (JA 20 at 851 and 880-883). Thus, since the Northwest Representatives had actual adequate notice that they would need to respond to materials outside the complaint, the cases they cite requiring such notice are not in conflict with the decisions in this case.

II. THE EIGHTH CIRCUIT'S HOLDING THAT ISSUES OF TIMELINESS ARE PROCEDURAL MATTERS WHICH SHOULD BE LEFT TO ARBITRATORS IS CONSISTENT WITH ESTABLISHED LAW.

The Eighth Circuit's holding that the timeliness issue raised by the Northwest Representatives is a procedural one which "should be left to the arbitrator" (A-2) does not present an issue for review by this Court. The ruling of the court below was an application of the established federal law on this subject.

In *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964), the Supreme Court made clear that issues of procedural arbitrability are reserved for the arbitrator, not the courts. In *Wiley*, the Court held:

> Once it is determined, as we have, that the parties are obligated to submit the subject matter of a dispute to arbitration, procedural questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator.

Id., 376 U.S. at 557. *See also Automotive, Petroleum and Allied Industries Employees Union, Local No. 618 v. Town and Country Ford, Inc.*, 709 F.2d 509 (8th Cir. 1983) (rejecting contention that the timeliness issue

was substantive rather than procedural); *McKesson Corp. v. Local 150 IBT*, 969 F.2d 831 (9th Cir. 1992) (the question of the authority of the arbitrator to issue an award after contractual time limits had expired was a procedural matter reserved for the arbitrator). Moreover, arbitrators' decisions on such procedural matters are entitled to the highest degree of deference under the law. *See United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Paperworkers, Int'l Union v. Misco, Inc.*, 484 U.S. 29, 38 (1987); *Stroh Container Co. v. Delphi Industries, Inc.*, 783 F.2d 743 (8th Cir.), *cert. denied*, 476 U.S. 1141 (1986) (arbitrators' procedural determinations accorded even greater deference than substantive determinations). In the instant case, the courts below properly applied these authorities in finding that the timeliness issue was a procedural question for the arbitrator himself, and that his decision on this issue was entitled to deference.

Petitioners have attempted to manufacture a conflict in the Circuits, by pointing to cases in which the courts have evaluated the reasonableness of arbitrators' delay in the rendering of an arbitral award. (Pet. at 21 and n.13). Contrary to Petitioners' rather puzzling assertion, these cases do not turn on the distinction between substantive and procedural arbitrability, and they certainly do not conflict with the decisions of the courts below in this case. In fact, these cases apply the very same analysis as (and in fact were cited by) the District Court in the instant case, in rejecting the Northwest Representatives' claim that the delay in this case was unreasonable.[2]

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[2] In so holding, the District Court applied the well-settled law that late awards are deemed valid unless the parties have agreed to unequivocal language rendering late awards invalid, or, unless the delays are "unreasonable" or "prejudicial." *See Jones v. St. Louis-San Francisco Ry. Co.*, 728 F.2d 257, 264-266 (6th Cir. 1984); *Local 560, IBT v. Anchor Motor Freight, Inc.*, 415 F.2d 220 (3d Cir. 1969); *Lodge No. 725, IAM v. Mooney Aircraft, Inc.*, 410 F.2d 681 (5th Cir. 1969). These are the very cases cited in the petition (p. 21, n.13) as conflicting with the rulings below. The District

Petitioners also argue that the opinion below "raises an important question under the labor laws" because the Eighth Circuit decision will cause parties to avoid arbitration, fearing that arbitrators will take jurisdiction over issues which the parties did not intend to arbitrate. (Pet. at 22-23). This is nonsense. In fact, it is the Petitioners' conduct in attempting to take clearly arbitrable issues to court that threatens to undermine the arbitral process. All the parties entered the Dispute Resolution Agreement in order to secure an orderly, speedy, *non-judicial* process for resolving disputes arising from the integration of the two pilot groups. It was expected that such arbitrable decisions would be final and binding, and not subject to years of federal court litigation.

Furthermore, contrary to the Petitioners' contention (Pet. at 23), the courts below did in fact review the question of whether the parties to the Dispute Resolution Agreement intended that timeliness issues would be arbitrable. As the Distirct Court found, and as the Eighth Circuit agreed, the parties to the Dispute Resolution Agreement explicitly agreed that issues regarding interpretation and application of the parties' procedural agreement—the Dispute Resolution Agreement itself—were to be determined by the arbitrator. (A-2; A-6; A-16).

Thus, the Northwest Representatives' claims were rejected below, not only because they raised procedural issues under *Wiley*, but also because the Northwest Representatives did not show that there was a material issue of fact regarding Mr. Roberts' authority to resolve the timeliness issue. As the District Court found, the parties had agreed to leave issues of timeliness to the arbitral forum. Thus, this case does not raise the question ad-

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Court in the instant case cited these cases in concluding that: (1) the language of the Dispute Resolution Agreement contains absolutely no language which unequivocally provides for automatic invalidation of late Supplemental Awards, and (2) that Mr. Roberts' delay was reasonable and did not prejudice the Northwest Representatives. (JA 26 at 1127-1130).

vanced by Petitioners (Pet. at 22-23) of arbitrators deciding issues which the parties have not agreed to settle by arbitration.

Finally, contrary to Petitioners' assertions (Pet. at 23-24), it is obvious that the Eighth Circuit's decision does not prevent parties from agreeing to resolve procedural issues by alternate means, i.e., means other than arbitration. It is clear on the record in this case that the parties did agree on the arbitral forum for such issues. Petitioners' argument that the Dispute Resolution Agreement should be interpreted as removing the timeliness issue from the arbitrator's jurisdiction, is a transparent attempt to second-guess the arbitrator's interpretation of the contract. It is certainly not a basis for review by this Court. The courts below properly found that the parties bargained for the arbitrator's interpretations on such procedural issues and that such decisions are entitled to deference under established standards for judicial review of arbitral awards. *See, e.g., Stroh Container Co. v. Delphi Industries, Inc., supra,* 783 F.2d at 749.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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